FILE

No. 80-544

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,

*Petitioner,*

—v.—

NATIONAL LABOR RELATIONS BOARD

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR FIRST NATIONAL MAINTENANCE CORPORATION

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## QUESTION PRESENTED

Whether an employer's unilateral decision to terminate a losing portion of its operations solely for legitimate business reasons breaches the duty to bargain under Section 158(a)(5) of the National Labor Relations Act.

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*NLRB v. Insurance Agents International Union,* 361 U.S. 477, 80 Sup. Ct. 419, 4 L.Ed. 2d 454, 39 Lab. Cas. ¶ 66,239 , 45 L.R.R.M. 2704 (1960)..... 18

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*NLRB v. Wooster Div. of Borg-Warner Corp.,* 356 U.S. 342, 78 Sup. Ct. 718, 2 L.Ed. 2d 823, 42 L.R.R.M. 2034, 34 Lab. Cas. ¶ 71,492 (1958) ..... 10

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*Textile Workers Union v. Darlington Manufacturing Co.,* 380 U.S. 263, 85 Sup. Ct. 994, 13 L.Ed. 2d 827, 58 L.R.R.M. 2657, 51 Lab. Cas. ¶ 19,590 (1965) .13, 30, 31

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OTHER AUTHORITIES:

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Comment, *Partial Terminations—A Choice Between Bargaining Equality and Economic Efficiency*, 14 U.C.L.A. L. Rev. 1089 (1967) ..... 20

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U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-8, *Major Collective Bargaining Agreements—Subcontracting* (1969) ..... 23

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U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 2065, *Characteristics of Major Collective Bargaining Agreements, January 1, 1978* (1980) ..... 22

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## JURISDICTIONAL STATEMENT

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### OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit,[1] is reported officially at 627 F.2d 596 and is reported unofficially at 104 L.R.R.M. 2924. The findings of fact, conclusions of law and order of the National Labor Relations Board are reported officially at 242 N.L.R.B. No. 72 (1979) and are reported unofficially at 101 L.R.R.M. 1177 and 79-0 CCH ¶ 15,849. No other written opinions have been delivered.

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1 The decision below is set forth in Appendix A.

## JURISDICTION

The order of the United States Court of Appeals for the Second Circuit enforcing the Board's order was entered on July 9, 1980. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Section 10(f) of the National Labor Relations Act, as amended.

## STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the National Labor Relations Act (29 U.S.C. § 141, et seq.), as amended, are Sections 158(a)(1), 158(a)(3), 158(a)(5) and 158(d). They are set forth in Appendix B.

## STATEMENT OF THE CASE

The petitioner provides housekeeping and maintenance services for various customers. (J.A. 2).[2] It hires its own employees, and, as their sole employer, trains and supervises them in the performance of the contracted-for services at the customer's premises. (J.A. 2). There is no interchange of petitioner's employees between customer locations. (J.A. 85). During the spring and summer of 1977, the petitioner serviced between two and four nursing or old age homes, including the Greenpark Care Center in Brooklyn, where this case arose in July of that year. (J.A. 84). Petitioner had been under contract with Greenpark since April, 1976, and employed approximately 35 people in its operation there. (J.A. 62-63).

Petitioner had first contracted on April 28, 1976 to provide services at Greenpark. (J.A. 43-45). Under the agreement, and an annexed manual which described the overall basis for the services, petitioner furnished all necessary labor, supervision,

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2 "J.A." refers to the Appendix to this Honorable Court in the court of appeals submitted by the Solicitor General as a Joint Appendix.

training, tools, equipment and supplies required to do the work in a competent manner without interfering with the operations of the Center. In return, Greenpark provided necessary storage space, paid a management fee and reimbursed the petitioner for its gross weekly payroll and fringe benefits. (J.A. 43).

Either party had the right to terminate the agreement at any time by serving the other with 30 days' prior written notice. (J.A. 4). The agreement provided that, upon its termination, the Center would be prohibited from hiring any of petitioner's former employees for a period of 90 days. (J.A. 44). In March 1977, the Center served such notice on petitioner because of the maintenance staff's purported lack of efficiency. (J.A. 4). The parties were able to resolve this problem and the notice was rescinded. (J.A. 4).

On March 31, 1977, the Board conducted a secret ballot election among petitioner's employees at Greenpark. On May 11, the Board certified District 1199[3] as the representative of those employees. On July 12, District 1199 wrote to petitioner (apparently for the first time) noting its certification and its right to bargain and negotiate a contract for petitioner's employees working at Greenpark, and concluded: "We look forward to meeting with you or your representative for that purpose." (J.A. 2, 39).

In the meantime, on June 30, 1977, petitioner orally requested that the Center increase the management fee by $500 a week and advised the Center that if such an increase were not forthcoming the petitioner would discontinue its services effective August 1. (J.A. 72-73). A confirming mailgram to this effect was sent on July 6. (J.A. 40).

The April 28, 1976 agreement had set the management fee at $500 a week. (J.A. 44). Effective November 1, 1976, the fee was reduced to $250 a week; it remained at that level through

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3 District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

July 31, 1977, when petitioner withdrew from Greenpark. (J.A. 38, 46, 78). It is uncontroverted that petitioner was losing money at Greenpark. (J.A. 4).

Petitioner met with representatives of the Center on July 25 and was unable to negotiate an increase in the management fee. (J.A. 74-75). Therefore, that same day, petitioner wrote to Greenpark to advise it that all services would be discontinued effective midnight July 31. (J.A. 41).

Petitioner advised its employees on July 28 that they would be terminated on July 31. (J.A. 3, 77). Upon hearing of this, a representative of District 1199 called one of petitioner's principals and asked if the union could wait a while before withdrawing and terminating the employees. (J.A. 3, 79-80). Petitioner explained that if it stayed on beyond July 31 it would have to continue for another 30 days and that petitioner "couldn't afford it". (J.A. 80, 85). Petitioner suggested that the union representative discuss the matter with the Center to see if it would waive the 30-day notice provision. Given such a waiver, petitioner said, it "might be able to swing it." The representative of the union contacted the Center and was advised that it would have to get clearance from its attorneys. (J.A. 94). The next day (July 29), the Center informed the union that it would not waive the 30-day notice provision. (J.A. 98-99).

Petitioner withdrew from Greenpark on July 31. On August 1, the representative of District 1199 met with the owner and other representatives of the Center and asked, among other things, if the Center would hire petitioner's former employees. (J.A. 99-101). The union was then advised that a 90-day provision in the Center's contract with petitioner precluded it from hiring or keeping those people on the premises. (J.A. 100). There is no evidence that the union requested that petitioner waive this provision.

## THE BOARD'S CONCLUSIONS OF LAW AND ORDER

The Board, substantially adopting the conclusions of law of the Administrative Law Judge, found that petitioner had violated Section 8(a)(5) of the Act by unilaterally closing its Greenpark operation without bargaining with the union about the decision and by failing to respond to the union's July 12, 1977 request for bargaining. The Board further accepted the ALJ's finding that, by so refusing to bargain, petitioner had interfered with its employees' exercise of rights guaranteed to them under Section 7 of the Act, and thereby had violated Section 8(a)(1). The Board applied the doctrine it had established in *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 564-70 (1966), *as modified by General Motors Corp.*, 191 N.L.R.B. 951 (1971), *petition for review denied sub nom. International Union, UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972), that an employer has a duty to bargain over a decision to close a portion of its business unless that decision involves "such a significant investment or withdrawal of capital as to affect the scope and ultimate direction of the enterprise." (J.A. 1-9, 12-20).

The Board's order directed petitioner to bargain with the union with respect to the decision to terminate its operation at the Greenpark facility and, in the event petitioner did not resume the Greenpark operation, with respect to the effects of the decision to terminate.[4] The Board also directed petitioner to reinstate the discharged employees if the Greenpark operation was resumed, and, if the operation was not resumed, to place the discharged employees on a preferential hiring list for employment in other operations. Finally, the Board ordered

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4 The portion of the decision regarding "effects" was not a contested subject at the Board level, and is of no concern here. In a stipulation entered into prior to the submission of briefs to the court below, petitioner consented to the enforcement of the Board order directing petitioner to bargain over the effects of its termination at Greenpark. In that stipulation the parties agreed that effects bargaining took place subsequent to the administrative hearing, with petitioner agreeing to the payment of severance pay to the affected employees. (J.A. 19).

back pay for the discharged employees from the date of discharge to the date of any agreement or impasse reached in collective bargaining with the union. (J.A. 15-18).

## THE DECISION OF THE COURT OF APPEALS

The Court of Appeals for the Second Circuit, acting upon the petition of the Board pursuant to Section 10(f) of the Act, granted enforcement of the Board's order by a 2-1 vote. (App. A. at 7). The court expressly declined to follow the *per se* approach established by the Board in *Ozark Trailers, supra,* but rather held that this Honorable Court's decision in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964), support a presumption that there is a duty to bargain over a decision to close a portion of an ongoing business. (App. A. at 4-5).

The court of appeals observed that there are conflicting positions in the circuits and a lack of clear direction under *Fibreboard.* (App. A. at 3-4). It reasoned that a partial closing "affects 'terms and conditions of employment' at least as much as does the decision to contract out which the *Fibreboard* Court found to fall within the literal meaning of the statute." (App. A. at 5). The court said that this presumption could be rebutted by a showing that the "purposes of the statute would not be furthered by imposition of a duty to bargain," but found that no such showing had been made in this case. (App. A. at 5-6). Specifically, the court found that there was "significant reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits . . . or a reduction in the work force, which would in part or in whole have enabled Greenpark to give FNM an increased management fee." (App. A. at 6).

Judge Kearse, dissenting, would have denied enforcement of the Board's order on the ground that this Court's "carefully limited decision in *Fibreboard* . . . [does not require petitioner] to bargain over its decision to terminate" the Greenpark operation, especially since the losses suffered were unrelated to labor costs. (App. A. at 7). She concluded that peti-

tioner's decision "to conserve its capital by closing a losing operation was a matter of fundamental entrepreneurial discretion and was not 'suitable for resolution within the collective bargaining framework'." (App. A. at 8, quoting from *Fibreboard Paper Products Corp. v. NLRB, supra.*)

## SUMMARY OF ARGUMENTS

I. The National Labor Relations Board and the court below have ordered an erroneous and unjustifiable expansion of management's obligation to bargain collectively over a decision to close a financially unprofitable portion of its operations. This expansion is in express contradiction to the language and the history of the Act, and to the decision of this Honorable Court in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), and contravenes the great weight of judicial authority on the subject.

The subject matter at issue in the instant case, a managerial decision to terminate an unprofitable portion of a company's business operation, does not fail within the literal ambit of the term "wages, hours and other terms and conditions of employment." An analysis of the legislative history of the Act clearly reveals that Congress intended that this term be narrowly and literally construed. The congressional intent was to preclude each party to negotiations from interfering with the internal affairs and prerogatives of the other party. Moreover, the term "wages, hours and other terms and conditions of employment" has been construed by this Honorable Court to be words of "limitation". *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

II. This Honorable Court addressed the issue of the scope of management's duty to bargain collectively in *Fibreboard.* Writing for the Court, Mr. Chief Justice Warren held that a subject will be deemed a mandatory subject for bargaining if:

— Mandatory bargaining effectuates the purpose of the Act;

— A review of existing industrial bargaining practices illustrates the propriety of including a particular subject within the scope of mandatory bargaining; and

— The facts of the particular case demonstrate the propriety of submitting the dispute to collective bargaining.

In the absence of the aforesaid factors and in the absence of union animus, a decision to close an economically unprofitable portion of a business falls exclusively within the entrepreneurial prerogative of management.

In the case at bar, petitioner respectfully submits that all the factors enumerated by this Honorable Court in *Fibreboard* militate against a duty to bargain.

The imposition of a duty to negotiate over the decision to discontinue a financially unprofitable portion of a business would not effectuate the purposes of the National Labor Relations Act. The Act was designed to protect the free flow of interstate commerce by minimizing undue disruption caused by labor disputes. A requirement to bargain over a decision to close part of a business would unduly disrupt commerce by legitimizing strike activity in support of the union's negotiating position and by hastening the functional collapse of the operation in question through loss of secrecy with concomitant impact on key personnel, suppliers and customers.

Existing industrial practice does not illustrate the propriety of subjecting a managerial decision to close an unprofitable portion of a business to collective bargaining. An analysis of both official U.S. government and private sector surveys of collective bargaining agreements reveal that only a tiny percentage (approximately 3%) of all labor agreements surveyed mandate bargaining over a decision to close. Therefore, the overwhelming majority of labor contracts have excluded decisions to close part of a business as a subject of negotiations.

Finally, the facts of the case at bar do not in any way warrant the imposition of a bargaining obligation. It is undis-

puted that the decision to close the Greenpark facility was totally unrelated to labor costs. There was no history of the company and the unions which represented its employees ever attempting to resolve problems of this nature by means of negotiation. Most importantly, the decision to discontinue the Greenpart operation substantially altered the company's basic direction and dictated a major change in the allocation of its resources.

III. It is respectfully submitted that the Court of Appeals for the Second Circuit misconstrued the decision of this Honorable Court in *Fibreboard* and erroneously expanded the scope of mandatory negotiations in the case at bar. When viewed in its proper context, the *Fibreboard* rationale operates to reserve to management those decisions lying at the "core" of entrepreneurial discretion and control. This interpretation has been embraced by the vast majority of circuits which have addressed the issue.

## ARGUMENT

## I.

## THE N.L.R.A. DOES NOT REQUIRE AN EMPLOYER TO BARGAIN WITH THE UNION ABOUT THE EMPLOYER'S DECISION TO DISCONTINUE PART OF A BUSINESS SOLELY FOR ECONOMIC REASONS.

### A. *The Language of The Statute and its Legislative History*

The National Labor Relations Board, pursuant to its statutory authority to investigate, to rule upon and to prevent the commission of unfair labor practices,[5] was granted the responsibility, subject only to limited judicial review, of determining which matters must be discussed within the dynamics of the collective bargaining process as mandatory subjects of bargaining, which subjects may be discussed on a voluntary basis as

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5 Section 10 of the Wagner Act, 49 Stat. 453 (1935), presently 29 U.S.C. § 160.

permissive subjects of bargaining, and which subjects, because of basic questions of illegality or public policy, are prohibited as subjects of collective bargaining and are thus removed from the negotiating arena.[6]

The legislative history of Section 8(d) of the Act does not dispositively assist in the identification of those subjects which fall within the parameters of the statutory definition of "wages, hours, and other terms and conditions of employment." In considering the formulation of Section 8(d), Congress apparently rejected the House version of the bill,[7] which had enumerated a precise list of subjects for mandatory bargaining and expressly states that parties need not discuss any other subjects.[8] The House was concerned that the N.L.R.B. might overextend its legislative mandate in attempting to control the terms of collective bargaining.[9] This concern was

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6 While the Wagner Act did not explicitly confer this power upon the N.L.R.B., the implied authority is predicated upon the Board's Section 10 (29 U.S.C. § 160) responsibility to prevent parties from engaging in unfair labor practices.

It was this Court's decision in *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) which clarified the then existing conflict between the N.L.R.B. and the reviewing circuit courts' construction of the range of subjects which come within the statutory phase. In *Borg-Warner*, this Court came to providently demarcate the three categories of bargaining proposals—mandatory subjects, permissive (or voluntary) subjects, and illegal subjects—and established rules for each.

7 *See* 93 Cong. Rec. 5298 (1947).

8 The House bill stated that neither party would be required to discuss any subject matter other than (i) wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, layoff, recall, seniority, discipline, promotion, demotion transfer and assignment with the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects. See H.R. Rep. No. 3020, 80th Cong., 1st Sess., § 101(2)(11) (1947), reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 166-67 (1974).

9 See H.R. Rep. No. 245, 80th Cong., 1st Sess. 20 (1947) reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RE-

premised on the assumption that is revisited in the instant case, namely, that neither party has a right to bargain with regard to the internal affairs of the other.[10] The final bill ultimately did not contain explicit restrictions on subjects suitable for the collective bargaining process, but instead adopted the flexible and imprecise terminology "wages, hours and other terms and conditions of employment."[11]

A restrained approach was embraced by the federal judiciary in the interpretation of this language. A major case illustrating in this concept was *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961), which involved an employer's managerial decision to close one plant of a multi-plant operation and transfer its work to a second plant. The second circuit held that the decision "was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion." 293 F.2d at 176.

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LATIONS ACT, 1947, at 311 (1974). The report stated: "Unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements." *Id.*

10 See id. at 22-23, reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 313-14 (1974). In its Report, the House stated:

> Just as the employer has no right to bargain about who the union's officers and representatives will be, what dues and assessments it shall impose, how it shall spend its money or otherwise conduct its internal affairs so long as they do not affect the employer's operations, so the union has no right to bargain with the employer about who his agents will be, what prices he will charge, what his profits shall be, or how he shall manage his business, so long as he does not violate the union's contract with him or ignore his obligations under the Labor Act.

11 See National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1976). While the final bill utilized the language suggested by the Senate conferees', *see* S. 1126, 80th Cong., 1st Sess. § 8(d) (1947), *reprinted in* LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 14-15 (1974), the legislative history contains no discussion of the Senate's interpretation of that language. This Court last reviewed, in some detail, the statutory phraseology's legislative history and intended import in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).

The trend in administrative and judicial moderation in the construction of the phrase "wages, hours and other terms and conditions of employment" was subsequently affected by the decision of this Honorable Court in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964).

### B. *Fibreboard* and *Darlington*

*Fibreboard Paper Products Corp. v. NLRB, supra,* is the landmark case in the area of management's obligation to bargain collectively. As such, it has aroused much controversy among judges, practitioners and scholars.

The facts of the *Fibreboard* case seem deceptively simple. The maintenance employees at the employer's Emeryville, California facility constituted a separate unit for purposes of collective bargaining and were represented by a union which had negotiated a series of agreements on their behalf. Shortly before the expiration date of the last of these agreements, the union requested negotiations with the employer in order to obtain a successor contract. The union was informed by the company that bargaining would be pointless because management had decided to contract out all the maintenance work in the plant. This unilateral step was taken by management in order to control the costs of its maintenance operation. The contractor had assured the company that costs could be curtailed by reducing the work force, decreasing fringe benefits and overtime payments, and by pre-planning and scheduling the services to be performed. No negotiations took place subsequent to the decision to contract out the work and the employer's indigenous maintenance workers were terminated.

This Honorable Court held that the employer had violated § 8(a)(5) of the Act. Mr. Chief Justice Warren delivered the opinion of this Honorable Court. The Court noted that the decision to contract out did not alter the company's basic operation or its investment of capital. The same work was still being performed, although by employees of an independent contractor. Therefore, to require the employer to bargain

about the matter would not significantly abridge its freedom to manage its business. In addition, the Court found that, since the company acted out of concern for labor-related costs, the dispute was one particularly suitable for resolution within the collective bargaining framework.[12]

It should be noted that *Fibreboard* dealt with situations where the employer was not motivated by union animus. In a later decision, *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965), this Honorable Court held that an employer, even if motivated by union animus, could lawfully close a portion of its enterprise if, in so doing, it was not seeking to "chill unionism" in the remaining portions of the enterprise and such a result could not reasonably have been foreseen to have that effect. 380 U.S. at 275.*

Succinctly summarizing the narrow holding and cautious thrust of the Court's opinion in *Fibreboard,* Chief Justice Warren announced:

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). (379 U.S. 215).

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12 *Fibreboard Paper Products Corp.*, 130 N.L.R.B. 1558, 1559-60 (1961). The NLRB distinguished prior case law, stating:

> None of the obligations heretofore imposed with respect to (termination rights) concern . . . the question whether . . . termination will occur; all . . . are concerned solely with such matters as selection for termination among present employees, and benefits flowing from present employment which employees may be entitled to receive at the time of or following the termination of employment.

* The Petitioner joins in without repeating the arguments of *Amicus Curiae*, the Chamber of Commerce of the United States, regarding the impact of *Darlington* on the case at bar.

Then, addressing more basic concerns (for the N.L.R.B. majority had painted with a "broad brush" apparently in *per se* terms, rather than narrowly delimiting its result as did this Court),[13] Mr. Chief Justice Warren warned:

> Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy. (Id. at 316)

Mr. Justice Stewart, joined by Mr. Justice Douglas and Mr. Justice Harlan, in a concurring opinion wrote that *Fibreboard* "most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty." *Id.* at 218. Further, as the concurring Justices noted:

> [T]here are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest

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13 This "broad brush" approach, first plainly taken in *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), represented a marked departure from the Board's earlier-held view that an employer could lawfully discontinue, reduce, or change its method of operation for any reason, provided only that such a decision was not motivated by a desire to interfere with or to defeat its employees' union activities. *See J.E. Cote*, 101 N.L.R.B. 1486, 1507 (1952); *Krantz Wire & Manufacturing Co.*, 97 N.L.R.B. 971, 988 (1952); *Walter Holm & Co.*, 87 N.L.R.B. 1169, 1172 (1949); *Auto Stone Works*, 81 N.L.R.B., 1203, 1220-21 (1949); *Mahoning Mining Co.*, 61 N.L.R.B. 792, 803 (1945). Indeed, the Board's 1952 statement in *Krantz Wire & Manufacturing Co., supra*, was quite different from the position it took here:

> An employer is free to close his plant and discharge his employees for any reason or for no reason at all, provided only that he does not do so with the purpose of discouraging or encouraging union membership, or otherwise interfering with the exercise by his employees of the rights guaranteed in Section 7 of the Act. *When he closes his plant for legitimate business reasons the Act does not require that he consult with his employees' representatives as a pre-requisite to going out of business.* (97 N.L.R.B. at 988; *emphasis added*).

> in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. [*Id.* at 223.]

The limited holding of *Fibreboard* was carefully drafted to discourage extension of the duty to bargain into core areas of entrepreneurial decision-making.

## II

## APPLICATION OF THE PRINCIPLES ADOPTED BY THIS COURT IN *FIBREBOARD* WARRANTS REVERSAL IN THE INSTANT CASE

While this Honorable Court carefully confined its *Fibreboard* decision to the narrow and specific facts of the case, it nevertheless provided a mode of analysis that should lead to reversal of the decision below.

### A. A Literal Approach to Bargainability Determinations Involving Closings of a Facility in Whole or In Part Should be Rejected.

The analysis starts with the principle that the phrase "wages, hours and other terms and conditions of employment" was intended to limit those matters upon which an employer must bargain. No such limitation was included in the Wagner Act. Restriction of mandatory bargaining to "wages, hours and other term and condition of employment" was the product of the Taft-Hartley amendments adopted by the 80th Congress in 1947. As this Honorable Court concluded in the *American*

*Insurance* case,[14] "The duty [to bargain] is limited to those subjects. . . ." (343 U.S. 395). This principle was recognized and reiterated in both the *Fibreboard* majority and concurring opinions. (379 U.S. at 211, 221).

Given those words of limitation, this Honorable Court's analysis in this case cannot begin and end with a literal application of the phrase "other terms and conditions of employment" any more than it did in *Fibreboard.* Otherwise, almost any unilateral management decision that resulted in termination of employment would automatically be a mandatory subject for negotiations with all which that implies in terms of protected economic activity, a result that most certainly must be rejected upon any reading of *Fibreboard.* Fairly viewed, both *Fibreboard* opinions sought to avoid just such an end by limiting the decision to its facts and by eschewing a "broad brush" rationale that could be read so as to mandate vast extensions of such bargaining into other areas, thus permitting it to impinge upon core areas of entrepreneurial concern.

Having rejected a literal approach to the issue (indeed, the type of mechanistic one subsequently adopted by the Board in partial closing cases[15]), the Court proceeded to resolve the

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14 *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

15 Despite the limited thrust of the *Fibreboard* opinions in this Honorable Court (as opposed to that of the Board majority in that very case), the National Labor Relations Board has since applied a *per se* rule, known as the *"Ozark Trailers"* doctrine, requiring employers to bargain about economically motivated decisions to terminate a portion of an enterprise that does not encompass an entire discrete line of business. The rule is applied whether the terminated portion is a manufacturing facility or service operation and irrespective of the wisdom of the decision in terms of efficient allocation of resources of the enterprise. *See e.g., National Family Opinion, Inc.*, 246 N.L.R.B. No. 84 (1979) (closing and contracting out of printing operations by survey research organization); *Lauer's Furniture Stores, Inc.*, 246 N.L.R.B. No. 58 (1979) (closing of subsidiary on verge of bankruptcy followed by sale of all stock); *North Carolina Coastal Motor Lines, Inc.*, 219 N.L.R.B. 1009, 1014 (1975), *enforced on other grounds*, 542 F.2d 637 (4th Cir. 1976) (decision to phase out uneconomical portion of

issue—not by virtue of a presumption favoring mandatory bargaining because bargaining unit employment had been terminated—but rather, by a careful balancing of three crucial factors:

1. Whether mandatory bargaining "seems well designed to effectuate the purpose of the National Labor Relations Act . . ." (379 U.S. at 210-11);

2. A "review of industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining" (379 U.S. at 211);

3. Whether the facts of the particular case illustrate the propriety of submitting the dispute to collective negotiations (379 U.S. at 213).

In the circumstances present here (involving far more than an in-plant substitution of a maintenance contractor's employees for those for the bargaining unit in order to save on wages, fringes, and to eliminate non-productive practices), an analysis of all three of these factors as applied to the instant case support the conclusion that the decision in issue is not a mandatory subject for bargaining.

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trucking operations); *Pine Valley Div. of Ethan Allen, Inc.*, 218 N.L.R.B. 208, 220 (1975) (shutdown of some plant operations); *Morrison Cafeterias Consol., Inc.*, 177 N.L.R.B. 591, 597 (1969), *enforcement denied*, 431 F.2d 234 (8th Cir. 1970) (closing of one of several cafeterias); *William J. Burns Int'l Detective Agency, Inc.*, 148 N.L.R.B. 1267, 1268 (1964), *enforcement denied*, 346 F.2d 897 (8th Cir. 1968) (termination of last security service in one market). *But see, Brockway Motor Trucks, Div. of Mack Truck, Inc.*, 251 N.L.R.B. No. 23 (1980), *on remand from Brockway Motor Trucks v. NLRB*, 382 F.2d 720 (3d Cir. 1979) (where total liquidation not contemplated at time of decision to close single facility, economic justification for not bargaining held insufficient), *appeal pending*.

**1. To Require An Employer to Bargain With A Union Regarding Its Economically Motivated Business Decision to Close a Portion of Its Business Does Not Effectuate The Purposes of the National Labor Relations Act.**

While one of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management differences to collective bargaining, it is respectfully submitted that a central theme of the National Labor Relations Act is that by recognizing the legitimate rights of both labor and management a free flow of commerce without undue disruption is promoted. Section 1(a) of that statute explicitly states that "[i]ndustrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other. . . ."

Far more, we submit, is at stake here than the delay in effectuating an employers decision to close its facility which may occur if such closure is subject to mandatory bargaining. Such delay may lead to increased losses compounded by interim departure of key personnel; declining productivity on account of reduced morale; security problems and perhaps sabotage while a confrontation ensues at the bargaining table.

If the decision to close a portion of the business is a mandatory subject of bargaining, absent a "no-strike" clause in an existing collective bargaining agreement, as in the case at bar, employees have a protected right to strike in support of their positions in opposition thereto.

The use of such economic pressure "is part and parcel of the process of collective bargaining." *NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 495 (1960). With partial discontinuances encompassed within the ambit of mandatory bargaining, unions would be free to seek coerced continuation of operations both by striking the facility directly involved or by picketing or striking other installations of the same em-

ployer, thus provoking sympathy strikes which are themselves protected concerted activities in the absence of explicit contractual proscription not encompassed within the usual "no-strike", "no-lockout" provisions and which are, regardless, not subject to injunction process when conducted peacefully. *See, e.g., Buffalo Forge Co. v. USW,* 428 U.S. 397, 404 (1976); *Gary-Hobart Water Corp.,* 210 N.L.R.B. 742 (1974), *enf'd.,* 511 F. 2d 284 (7th Cir. 1975), 39 Ann. Bd. Rep. at 80 (1974); Arthur B. Smith, *The Supreme Court, The Boys Markets Labor Injunctions & Sympathy Work Stoppages,* 44 U.Ch. Rev. 321 (1976).

All this is so even when a union perceives no rational economic alternative to the partial closing decision. Once a subject is labeled "mandatory" "neither party is legally obligated to yield." *NLRB v. American National Insurance Co.,* 343 U.S. 395 (1952). In these circumstances, a strike may "convince" the employer to continue an uneconomic or marginally profitable activity, foregoing superior or more rational allocation of the affected resources to avoid losses from economic pressure on its more profitable operations.[16]

The reality of this possibility was cogently noted in Board Member Rodgers' terse comments in *Fibreboard,* where he dissented from his colleagues' conclusion (which was subsequently modified by this Honorable Court) that subcontracting is a mandatory subject of bargaining:

> To be sure, in describing what is required by business management in such circumstances as these, my colleagues have sought to soften the impact of their ruling by such statements as the following: 'This obligation to bargain *in no wise restrains an employer* from . . . effectuating an economic decision to terminate a phase of his business operations . . . [a] prior discussion with a duly designated bargaining representative is all that the Act contemplates. [*Emphasis supplied.*]

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16 It is submitted that although this did not happen in the instant case, the possibility always exists in situations of this type.

> If the foregoing social niceties represented all that is involved, one could not object. But the fact remains that by making mandatory rather than permissive bargaining, my colleagues have, as they well know, thrust the entire question squarely into the arena of economic struggle and industrial turmoil where strikes, picket lines, charges, countercharges, protracted litigation, and many other aspects of economic power possessed by a union are 'protected' by this Board and are, therefore, legally available to a union to compel a complete abandonment by management of its proposal, on pain of suffering irreparable damage to every aspect of its business. That such a power, in pursuit of mandatory bargaining objectives, is effectively employed by many modern unions is manifest in countless cases which come to public attention and to the attention of this tribunal day by day.

See also, Comment, *Partial Terminations—A Choice Between Bargaining Equality and Economic Efficiency,* 14 U.C.L.A. L. Rev. 1089, 1091 (1967). See to same effect Justice Stewart's *Fibreboard* concurrence.

**2. Existing Industrial Bargaining Practices Do Not Support A Mandatory Bargaining Obligation Where A Facility Is Being Closed as a Result of An Employer's Economically-Motivated Decision.**

Since parties include permissive subjects as well as mandatory subjects in their contracts without converting such subjects into mandatory subjects of bargaining[17] a review of generally available pertinent materials* shows that only a miniscule proportion of major collective agreements contain any provisions restricting an employer's right to discontinue a portion of his business and that very few even provide for advance notice of such decisions and union participation

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17 *Fibreboard, supra,* 379 U.S. at 211.

* See nn.19 & 20, *infra.*

therein.[18] Even then, this small number includes restrictions on the right to relocate in an apparent effort of the union to avoid "runaway" shops, and to preserve employment rights at the new location.

In a 1969 Department of Labor study entitled *Major Collective Bargaining Agreements—Plant Movement, Transfer, and Relocation Allowances*[19] the Bureau of Labor Statistics ("BLS") examined 1,823 agreements (each encompassing a bargaining unit of more than 1,000 employees) covering over seven million workers in more than 30 industries, including both manufacturing and non-manufacturing categories, the latter purporting to encompass, among other things, various service occupations. Sixty-five agreements covering about 258,000 employees in service fields were included in the study.

Of the 1,823 agreements, only 60 (or 3.3%) included provisions providing for notice of, union participation in, or limitation or prohibition of the decision to close *or* to relocate a plant or other operation. (BLS-A at 22). Of these 60 agreements, only 8 involved non-manufacturing contracts which numbered 775 out of the 1,823 agreements included in the study. *(Id.* at 27, 38). The 8 agreements equalled 1.03% of those contracts. Not included in these figures (and separate in the study) were 332 other agreements establishing notice requirements and other obligations in connection with the effect of decisions to close or relocate. (*Id.* at 22-37, 38). These contracts amounted to 18.2% of the total number of agreements studied and were five times more frequent than clauses

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18 "But data showing that many labor contracts refer to subcontracting or that subcontracting grievances are frequently referred to arbitrators under collective bargaining agreements, while not wholly irrelevant, do not have much real bearing, for such data may indicate no more than that the parties have often considered it mutually advantageous to bargain over these issues on a permissive basis." *Fibreboard supra,* 379 U.S. at 220. *See also Allied Chemical Workers, Local 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971).

19 U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-10, *Major Collective Bargaining Agreements* (1969). The relevant portions of this study are appended to this brief and are cited as "BLS-A".

requiring notice of, union participation in or prohibition of the decisions themselves.

Of the 60 agreements pertaining to the decisions to close or relocate (rather than their effects), 46 were simply notice provisions. The remaining 14 "assigned a more active role to the union." (*Id.* at 27). Three of the 14 "required a discussion between the union and the employer." (*Id.*). The other 11 (10 of which were in the apparel industry and 1 in leather goods) "require[d] the consent of the union prior to an employer's relocating the plant or constructing additional facilities." (*Id.* at 8.)[20]

The BLS apparently has not published any more recent data updating the 1969 study described above. In 1980, however, in an omnibus compilation entitled *Characteristics of Major Collective Bargaining Agreements, January 1, 1978,*[21] the BLS included data pertaining to advance notice clauses by industry. These provisions applied to layoffs, plant shutdowns or relocations, and technological changes embodied in 1,536 agreements covering 7,054,550 workers in units of 1,000 employees or more. (BLS-B at 42.) No distinction was drawn whether the advance notice clauses tallied by the BLS actually applied to the decision involved or to the effect thereof and, once again, plant shutdowns and relocations were grouped under one heading. Even when so grouped, contracts with such provisions numbered only 160 out of the 1,536 surveyed, or 10.4 percent. Only five of the 71 agreements in the "services" field had such clauses, or about 7 percent. (*Id.*).

Similar results were produced by another recent survey entitled Bureau of National Affairs, *Basic Patterns: Management and Union Rights,* Collective Bargaining Negotiations and Contracts § 65:1 (1979). There, management rights clauses

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20 U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 2065, *Characteristics of Major Collective Bargaining Agreements, January 1, 1978* (1980), cited as "BLS-B".

21 The pertinent sections referred to in the text address themselves to facility relocation.

in a sample of 400 collective agreements were analyzed. Provisions in 52 agreements (13 percent of the sample) dealt with plant shutdowns or relocations, with no line drawn by the editors between shutdowns and relocations or between the decisions and their effects. Commenting on these 52 contracts the BNA stated:

> In 44 percent of these agreements, the displaced employee has transfer rights to a new location and in 24 percent the company is required to pay at least a portion of the employee's moving costs. Advance discussion with the union is required in 14 percent of the [52] agreements [*i.e.* 7 contracts] dealing with the subject. (*Id.* at 65:3-4.).

Such survey suggests that the incidence of labor-management inclusion of a provision requiring an employer to bargain over its decision to close or relocate a facility is too statistically infrequent for the NLRB to reasonably mandate such decisional bargaining on a national basis.[22]

In *Fibreboard,* referring to a BLS study that showed that about 25 percent of some 1,687 collective agreements "contained some form of a limitation on subcontracting", (379 U.S. at 212 n.7),[23] the Court noted:

> Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework. (*Id.* at 211).[24]

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22 *See,* Collective Bargaining Negotiations and Contracts, The Bureau of National Affairs, Inc., §§ 65:1-65:6, No. 879 (1979).

23 That study itself commented that "[n]umerous clauses allowed the union to participate in the making of subcontracting decisions." 84 Monthly Labor Rev. 579, 583 (1961).

24 Indeed, since *Fibreboard,* a later version of the BLS study that was relied on by the Court has been issued. It shows that as of 1965-66 subcontracting limitations had increased to 43.9 percent of the contracts sampled. See U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-8, *Major Collective Bargaining Agreements—Subcontracting* (1969).

No such conclusion can properly be drawn from the facts presented here. Indeed, if anything, they indicate that "experience illustrates" that the industrial relations community has not brought the decision to close a plant or service operation for economic reasons widely within the ambit of collective bargaining. Indeed, the tiny number of agreements that pertain to such decisions tend, if anything, to demonstrate, based on industrial experience, that the subject is permissive rather than mandatory.

### 3. The Facts of This Case Lead To The Conclusion That Mandatory Bargaining is Inappropriate

In *Fibreboard,* the Court noted that the facts of that case "illustrate[d] the propriety of submitting the dispute to collective bargaining." (379 U.S. at 213). Similar considerations do not apply here.

First, Fibreboard "was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments", all "long . . . regarded as matters peculiarly suitable for resolution within the collective bargaining framework." (*Id.* at 213-14).

In the instant case, First National Maintenance's decision to abandon the Greenpark operation had nothing to do with labor costs. Its contract with the home was "cost plus"; that is, First National Maintenance was reimbursed for wages, fringes and the like and received $250 each month to administer, supervise and maintain a cleaning staff of 35 at that location. The fee had been $500 a month but was reduced to $250, and the company simply could not get its customer, Greenpark, to agree to an increase. Labor costs, thus, did not cause First National Maintenance to drop Greenpark as a customer. Its withdrawal can in no way be termed an attack on the basic wage structure or attempt to undermine conditions of employment. (*Compare, Fibreboard,* 379 U.S. at 212).

Secondly, there certainly was no showing here, as there was in *Fibreboard,* that other unions in the same facility " 'had joined hands with management in an effort to bring about an economical and efficient operation.' " (379 U.S. at 211). There were no other unions representing First National Maintenance's employees at Greenpark and, in any event, there could be no such showing, for the losses that motivated the employer's discontinuance could not have been alleviated in bargaining under the Act between the only two parties required to do so: District 1199 and First National Maintenance. Greenpark was not a party to a Board-imposed obligation to bargain and would not even waive the 30-day "stay-on" provision in the contract with petitioner—something that might have allowed First National Maintenance to stay on and meet with the union.

Thirdly, abandonment of Greenpark by the company, which serviced less than 5 nursing homes at the time,[25] certainly altered the company's basic operation; there was no simple replacement of bargaining unit personnel with cut rate employees working for a contractor as there was in *Fibreboard,* where everything else remained unchanged.

Moreover, losses incurred in the continued servicing of the Greenpark Center is conceptually identical to the economic factors which motivate management in the context of a plant closing. Whether capital is lost because an uneconomical plant is required to remain open pending negotiations over the decision to close it or a losing service operation must be maintained pending bargaining to impasse is, we submit, a distinction without substance.

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25 There is no evidence in the record whether First National Maintenance serviced other facilities as well.

## III.

## THE COURT BELOW HAS MISCONSTRUED THE DECISION OF THIS HONORABLE COURT IN *FIBREBOARD* AND HAS THEREBY ERRONEOUSLY EXPANDED THE SCOPE OF MANAGEMENT'S BARGAINING OBLIGATION

In view of this petitioner, the decision of this Honorable Court in *Fibreboard* was very carefully limited. Mr. Chief Justice Warren repeatedly emphasized that the majority's decision was based on the facts of that particular case. The Court went so far as to state that the decision "need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy." (379 U.S. at 216.)

The rationale behind this extraordinarily careful limitation of judicial language is most important. It holds the key to a proper understanding of the scope of management's bargaining obligation.

It must be remembered that, at the time *Fibreboard* was decided by this Honorable Court, judicial opinion was virtually unanimous that fundamental entrepreneurial decisions fell within the sole discretion of management. Mr. Chief Justice Warren was very careful to state that a duty to bargain would be imposed only where that duty would not encroach on management's ability to run its business:

> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business. (379 U.S. at 215).

In addition, the majority's opinion stressed that the subcontracting was undertaken to reduce the costs of the maintenance operation. A large component of these costs were *labor-related*: the size of the work force, fringe benefits and overtime payments. These were areas, the court held, where existing industrial practice already proved that collective bargaining was both common and effective in resolving disputes.

This Honorable Court took pains to explain that no new inroads were being made at the expense of entrepreneurial prerogatives. Bargaining would only be required in areas that did not in any way obstruct the running of the enterprise and where bargaining was already prevalent.

In essence, this Honorable Court has established its own "initial presumption." A subject which was heretofore within the sole discretion of management and is fundamental to the basic direction of a corporate enterprise is presumed to lie outside the scope of mandatory collective bargaining. This presumption may be rebutted by showing that: 1) the subject would not alter the company's basic operation; 2) allocation of resources and/or capital would not be restricted; 3) the matter would not significantly abridge management's freedom to manage the business; and 4) the matter lies within the literal meaning of the terms "wages, hours and other terms and conditions of employment."

The "initial presumption" established by the Second and Third Circuits is very different from the intent and operation of this Honorable Court's *Fibreboard* decision. In fact, they are exact opposites. The court below held that everything impacting on "wages, hours and other terms and conditions of employment" will be presumed to be a mandatory subject of bargaining unless rebutted.

Obviously reflecting careful thought, the opinion of Judge Lasker began by tracking the several factors, only beginning but certainly not ending with the literal words of Section 8(d), that underlay the decision of the Court (and, still more clearly, the concurrence) in *Fibreboard*. Nevertheless, when it came to

the actual resolution of the problem in this case, the court allowed itself, in our view, to be led astray by narrow and undue focus upon the bare words "terms and conditions of employment."

The partial closing, the court said, "affects 'terms and conditions of employment' at least as much as does the decision to contract out which the *Fibreboard* Court found to fall within the literal meaning of the statute." (App. A at 11).

With that much stated, the court proceeded directly to its "presumption" that this is a mandatory subject of bargaining.

Equally without foundation is the Second Circuit's use of so-called "futility" in its analysis of what might or might not rebut the presumption it established. Such a criteria is simply a "license to speculate" in the light of hindsight about what might or might not have happened in negotiations that never took place.

The danger of such speculation is apparent from the face of the majority opinion below where the court found the presumption unrebutted based in large measure upon the speculation that

> the union might have made concessions by accepting reductions in wages or benefits (take backs) or a reduction in the work force, which would in part or in whole have enabled Greenpark to five FNM an increased management fee. At least, if FNM had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution. (*Id.* at 602).

Nothing in the record supports this speculation and it is nothing more than speculation, for:

> Greenpark was in no way obligated to deal with the Union; it was not a joint employer;

Greenpark had no apparent other relationship with that labor organization;

Greenpark was unwilling even to waive the 30 day "stay-on" clause which might have allowed FNM to remain on for a while; and

Greenpark had ample opportunity in negotiations with FNM in June and July to suggest either a reduction in staffing or labor costs.

In these circumstances, the anticipation by the court of appeals of possible concessions by Greenpark that might have allowed petitioner to remain there serves to display the unrealism, and the consequent unsoundness, of the court's rationale.

## IV.

## A MAJORITY OF THE CIRCUITS HAVE HELD THAT A DECISION TO CLOSE AN ECONOMICALLY UNPROFITABLE PORTION OF A BUSINESS IN THE ABSENCE OF UNION ANIMUS IS NOT A MANDATORY SUBJECT OF NEGOTIATIONS

Despite the abrupt reversal of the NLRB's traditional reluctance to impose a bargaining obligation upon employers concerning fundamental managerial decision-making, the weight of authority in the circuit courts of appeals has been that such decisions are not mandatory subjects for negotiation. The Court of Appeals for the Fourth, Eighth, Ninth and Tenth Circuits have consistently held that there is no duty to bargain over an economically motiviated decision to terminate a portion of the business enterprise in the absence of union animus. On the other hand, the Courts of Appeals for the Second and Third Circuits have held that there is an "initial presumption" in favor of the duty to bargain in cases of partial closings for economic reasons. All the circuits are unanimous in rejecting the NLRB's *per se* approach.

The Court of Appeals for the Eighth Circuit, squarely at odds with the positions adopted by the Second and Third Circuits, has repeatedly found no duty to bargain over partial closings decisions, whether the terminated portion is a plant or service operation. This position was most recently and cogently restated in *Royal Typewriter Co. v. NLRB,* 533 F.2d 1030, 1039 (8th Cir. 1976). The circuit court made it clear that it does not adopt the Board's view, which the NLRB has continued to press since its holding in *Ozark Trailers, Inc.,* 161 N.L.R.B. 561, 564-570 (1966), that an employer operating two or more plants is obliged to bargain with respect to a decision to close one of those plants. In that case, the Court stated that:

> . . . . We squarely rejected that holding in *NLRB v. Drapery Manufacturing Co., supra,* 425 F.2d at 1026, 1027-28 and reaffirmed our adherence to the view set forth in *NLRB v. Adams Dairy, Inc.,* 350 F.2d 108, 110-113 (8th Cir. 1965), *cert. denied,* 382 U.S. 1011 (1966), that, absent union animus, a company has no legal duty to bargain with a union over the decision to partially shut down its operations because of economic reasons. *See also Morrison Cafeterias Consolidated, Inc. v. NLRB,* 431 F.2d 254, 257 (8th Cir. 1970). (533 F.2d at 1039).

In *NLRB v. William J. Burns International Detective Agency, Inc.,* 346 F.2d 897 (8th Cir. 1965), the same rationale was applied to the discontinuance of a service operation. More particularly, the court refused to uphold the Board's ruling that Burns' unilateral decision to terminate its only remaining service contract in Omaha constituted an unlawful refusal to bargain:

> The rationale of *Fibreboard* as applied to the facts of this case does not support the Board's decision. Under *Darlington,* the finding of lack of anti-union motivation in closing the Omaha Division for economic reasons precludes a finding of unfair labor practice in refusing to bargain with the union on the cancellation of the

Creighton contract and the closing of the Omaha Division. (346 F.2d at 902).

The Fourth Circuit has adopted a substantially similar position, refusing to find a violation of § 8(a)(5) where the employer's decision to close a portion of its business is not motivated by union animus constituting a violation of § 8(a)(3) under *Darlington*. In *NLRB v. Edward M. Rude Carrier Corp.*, 79 Lab. Cas. ¶11,615, *reported without published opinion*, 541 F.2d 277 (4th Cir. 1978), the court held that an employer "ha(d) not abrogated its bargaining obligations" where there was no substantial evidence of anti-union motivation and "(t)he company's representative testified without contradiction that for almost two years before finally writing off this portion of its organization, the employer had considered the total cancellation of it because dissatisfied with the profits . . ." 79 Lab. Cas. at 21, 635-36; *Accord, NLRB v. North Carolina Coastal Motor Lines, Inc.*, 542 F.2d 637, 638 (4th Cir. 1976).

In similar fashion, the Tenth Circuit, citing *Darlington*, has held that a company "solely motivated by a sound economic reason, ha(s) no duty to bargain on the decision" to close a portion of its business. *NLRB v. Thompson Transport Co.*, 406 F.2d 698, 703 (10th Cir. 1969). The Court also cited with approval the decision of the Ninth Circuit in *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967), which held:[26]

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26 *See, e.g., Metro Transp. Servs. Co.*, 218 N.L.R.B. 534, 536 (1975) (closing of one of two local pickup and delivery service operation); *Morrison Cafeterias Consol., Inc.*, 177 N.L.R.B. 591, 595-97 (1969), *enforcement denied*, 431 F.2d 254 (8th Cir. 1970) (closing of one of several cafeterias); *William J. Burns Int'l Detective Agency Inc.*, 148 N.L.R.B. 1267, 1268 (1964), *enforcement denied*, 346 F.2d 897 (8th Cir. 1965) (termination of last security services contract in one market). *Cf. Empire Dental Co.*, 211 N.L.R.B. 860, 866-68 (1974) (closing of in-house dental clinic laboratory followed by contracting out of laboratory work). *But see Brockway Motor Trucks, Div. of Mack Trucks, Inc.*, 251 N.L.R.B. No. 23 (1980), *on remand from Brockway Motor Trucks v. NLRB, supra*, 582 F.2d 720 (3rd Cir. 1978) (where total liquidation not contemplated at time of decision to close single facility,

> A company's decision, based solely on greatly changed economic conditions, to terminate its business and reinvest its capital in a different enterprise in another location as a minority partner is not a subject of mandatory collective bargaining within the meaning of § 8(a)(5). *A decision of such fundamental importance to the basic direction of the corporate enterprise is not included within the area of mandatory collective bargaining.* (380 F.2d at 939; *emphasis added*)

In a compelling recent decision styled *NLRB v. International Harvester Co.*, 618 F.2d 85 (9th Cir. 1980), the Ninth Circuit faced the precise question presently before this Honorable Court, unanimously holding that the managerial decision to alter the employer's marketing structure and to close one of its facilities, absent anti-union motivation, was within the prerogative of management, irrespective of the loss of bargaining unit jobs that would result from the business judgment. The Ninth Circuit did enforce that portion of the NLRB's order (as did the dissent below) which directed the employer to bargain with the union concerning the effects of the decision to terminate its operations at that particular business facility.

In *NLRB v. Iron Workers,* 434 U.S. 335, 360 (1978), the Ninth Circuit Court of Appeals, despite its recognition of this Honorable Court's consistent policy of deferring to the NLRB whenever possible, held:

> . . . . nevertheless, we conclude that the Board misapplied the law in determining that International Harvester's decision was subject to mandatory bargaining. . . . A company must bargain in good faith over management decisions affecting terms and conditions of employment *(citation omitted)* . . . [M]anagement decisions that fundamentally alter the direction of an enterprise, or involve significant reallocation of capital are generally not consid-

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economic justification for not bargaining held insufficient), *appeal pending.*

ered decisions concerning terms and conditions of employment and are not mandatory subjects of bargaining. *See Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. at 223 (Stewart, concurring); *NLRB v. Transmarine Navigating Corp.,* 360 F.2d 933 (9th Cir. 1967).

Thus, it can be clearly seen that the Fourth, Eighth, Ninth and Tenth Circuits adhere to the traditional and restrictive position concerning a mandatory duty to bargain over managerial decision making.

On the other hand, the Second and Third Circuits, by divided courts, have followed a different path: an "initial presumption in favor of bargaining."

In 1978, the Court of Appeals for the Third Circuit announced its decision in *Brockway Motor Trucks v. NLRB,* 582 F.2d 720 (3d Cir. 1978). In that case, the employer decided to close one of its plants on economic grounds without notifying or bargaining with the affected union. No union animus was found. The court, over a very vigorous dissent, held that there is an "initial presumption" that a partial closing is a mandatory subject of bargaining under the Act. The presumption may be rebutted if the employer can prove that its interest in expeditiously implementing its decision outweighs the interests of the employees in attempting to preserve their jobs: a "comparative harm" test. Judge Rosenn based his dissent on three major points: (1) the majority has fashioned a new rule of law out of whole cloth in total disregard of a vast body of precedent; (2) inadequate consideration was given to the important interests of the employer; and (3) the majority's new rule is impractical as well as untenable and would require constant judicial intervention in the affairs of the parties.

The Third Circuit recently reaffirmed its adherence to the "Brockway Rule" in *Equitable Gas Co. v. NLRB,* _____ F.2d _____ , 106 L.R.R.M. 2201 (3rd Cir. 1981).

The Court of Appeals for the Second Circuit, in the decision below, also opted to create an initial presumption of bargain-

ability in regard to partial closings. In this case, however, the court held that the presumption could be rebutted by showing the purposes of the Act would not be furthered by imposition of a duty to bargain. Judge Kearse, in a well-reasoned dissent, held that neither *Fibreboard* nor any other authority supported creation of the presumption. The dissent also noted that it was uncontroverted that the employer was steadily losing money on the operation it finally terminated and that the decision to close a losing operation is a matter of fundamental entrepreneurial discretion and is not suitable for resolution within the collective bargaining framework.

The imposition of a presumptive duty to bargain with labor would improperly constrict an area of choices "which lie at the core of entrepreneurial control." *Fibreboard Paper Products Corp. v. NLRB, supra,* 379 U.S. at 223 (1964). In this petitioner's view, the presumptive bargaining obligation imposed upon employers and urged only by the divided court below and the split Third Circuit Court of Appeals[27] would not further the avowed purposes of the Act to insure the free and unimpeded flow of interstate commerce.

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27 Section 1 of the National Labor Relations Act, as amended 29 U.S.C. § 141, provides, in pertinent part:

> . . . It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

## CONCLUSION

The judgment of the Court of Appeals for the Second Circuit in the instant matter should be reversed and the order of the National Labor Relations Board should be denied enforcement.

Respectfully submitted,

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